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Nos. 06-969 and 06-970

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *Appellant*,

v.

WISCONSIN RIGHT TO LIFE, INC., *Appellee*.

SENATOR JOHN MCCAIN, *ET AL.*, *Appellants*,

v.

WISCONSIN RIGHT TO LIFE, INC., *Appellee*.

On Appeals from the United States District Court for the District of Columbia

BRIEF OF *AMICI CURIAE* THE CENTER FOR COMPETITIVE POLITICS, THE INSTITUTE FOR JUSTICE, REASON FOUNDATION, THE INDIVIDUAL RIGHTS FOUNDATION, AND THE CATO INSTITUTE, IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

The Center for Competitive Politics is a non-profit 501(c)(3) organization founded in August, 2005, by Bradley Smith, former Chairman of the Federal Election Commission, and Stephen Hoersting, a campaign finance attorney and former General Counsel to the National Republican Senatorial Committee. Over the last decade, well over $100 million has been spent to produce ideological studies promoting campaign finance regulation. Those studies have gone largely unchallenged, and dominated the policy debate. CCP is concerned that a politicized research agenda has hampered both the public and judicial understanding of the actual effects of campaign finance laws on political competition, equality, and corruption. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process.

The Institute for Justice ("IJ") was founded in 1991 and is our nation's only libertarian public interest law firm. It is committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. IJ seeks a rule of law under which individuals can control their destinies as free and responsible members of society. IJ works to advance its mission through both the courts and the mainstream media, forging greater public appreciation for economic liberty, private property rights, school choice, free speech, and individual initiative and responsibility versus government mandate. This case involves just such a funda-

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

mental clash between freedom of speech, assembly, and petitioning on the one hand and repressive government mandates on the other, and thus touches the very core of IJ's mission and ideals.

Reason Foundation is a nonpartisan and nonprofit 501(c)(3) organization, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason Magazine, as well as commentary on its website, reason.com, and by issuing policy research reports, which are available at reason.org. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues. This case involves a serious threat to freedom of speech, assembly, and petitioning, and contravenes Reason's avowed purpose to advance "Free Minds and Free Markets."

The Individual Rights Foundation ("IRF") was founded in 1993. It is the legal arm of the David Horowitz Freedom Center ("DHFC"), a nonprofit 501(c)(3) organization (formerly known as the Center for the Study of Popular Culture). The mission of DHFC is to promote the core principles of free societies – and to defend America's free society – through educating the public to preserve traditional constitutional values of individual freedom, the rule of law, private property and limited government. In support of this mission, the IRF litigates cases and participates as *amicus curiae* in appellate cases, such as the case at bar, that raise significant First Amendment speech and associational issues.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited

government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case is of central interest to Cato and the Center because it addresses the further collapse of constitutional protections for political activity – including speech, assembly, and petitioning – relating to governmental policies and conduct, which lies at the very heart of the First Amendment.

SUMMARY OF ARGUMENT

1. The right to self-government at the heart of the First Amendment and our constitutional democracy assumes the full and free discussion of who to elect and what such officials are doing while in office. The past thirty years of campaign finance jurisprudence has pushed us a long way down a slippery slope to destroying such freedom. The evolution of this Court's cases has used numerous imperfect analogies to extend from their origin to where we are today. The justifications for regulation have thus become so attenuated and the burden of regulation so exacerbated, that it is time put the breaks on any further restriction of core political speech.

2. Grass-roots lobbying ("GRL") represents a virtually "perfect storm" of First Amendment activity, involving speech, association, and petitioning. It plays a central role in our constitutional system and should be protected to the fullest, especially in light of the restrictions on other forms of core political speech.

3. The burdens imposed on GRL by the restrictions at issue in this case are severe and far-reaching. The restrictions are content-based, target an especially effective form of GRL, and cover periods of time far greater than previously assumed. Any supposed alternate channels of communication for such GRL are inappropriate considerations in the context

of strict scrutiny, will quickly be characterized as loopholes for circumvention by the government's own reasoning in this case, and are not adequate alternatives in any event.

4. The government's asserted interests for suppressing GRL is much attenuated from the interests it once asserted in *Buckley*, and its anti-circumvention rationale is particularly dangerous and non-compelling. Circumvention as an interest simply distracts from the attenuated nature of the original risk and forms a self-fulfilling and self-perpetuating justification for ever greater restrictions. The original justifications of combating corruption and its appearance are not genuinely implicated by this case and are ill-conceived in any event insofar as they treat influencing elections through speech as corrupt. The communicative impact of speech is *precisely* the proper means for influencing the public, elections, and government conduct.

ARGUMENT

I. CAMPAIGN-FINANCE JURISPRUDENCE HAS STRAYED FAR FROM FUNDAMENTAL FIRST AMENDMENT AND DEMOCRATIC PRINCIPLES.

In our constitutional system predicated upon the sovereignty of the People, rather than the government, the most essential function of the First Amendment is to preserve the public's right to fully and freely discuss the qualities and conduct of their elected representatives in order properly to exercise their right to self-government. That fundamental democratic process operates not only in connection with the periodic decision of who shall serve as our elected representatives, but also in connection with the varied legislative and other actions those representatives take while in office. As this Court once recognized, the First Amendment has its "fullest and most urgent application" in the context of elections. *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971). And it has similarly urgent application in the context of discussions of

government policies and efforts to enlist the public to influence those policies.

The history of campaign finance regulation and jurisprudence has been a battle between such fundamental political freedoms and competing concerns that those very same freedoms could allow narrow private interests to control or manipulate government to their own parochial ends, to the detriment of the public interest as a whole. Such concerns are hardly new, and were known to the Founders as the problem of "faction." Today's concern over such factions, or so-called special interests, stems from the assumed ability of numerous groups and entities to exert improper influence through the aggregation and use of money to speak more, and more effectively, than they are supposedly due.

By contrast, Madison's greatest concern regarding the "violence of faction" was not the proliferation of many small factions, but the "superior force of an interested majority." Federalist No. 10, THE FEDERALIST PAPERS 45 (Rossiter & Kesler eds. 1999). The solution to the danger of faction was not to replace conflicting factions with a single majority faction of the public, but rather to render any potential majority faction "unable to concert and carry into effect schemes of oppression." *Id.* at 49. Any supposed concern with "special" interests thus misunderstands the entire problem of faction as it concerned the Founders. Far from being compelling, a desire to decrease or hobble special interests is anathema to the "republican remedy for the disease[]" of factionalism. *Id.* at 52. The proper remedy for a concern with factions is not to bind them, but rather to encourage their diversity and freedom to seek influence through speech, thereby allowing them to check each other with their conflicting efforts. The alternative – unfortunately now in ascendance – is to try to suppress the phenomenon of numerous factions "by destroying the liberty which is essential to its existence," but such remedy is "worse than the disease." *Id.* at 45-46.

With such basic principles in mind, a brief review of this Court's campaign finance jurisprudence will illustrate how far we have moved away from core First Amendment and democratic principles and how slippery is the slope upon which we now stand.

Over the past 30 years, this Court's protection of core political speech has eroded considerably. Indeed, the progression of this Court's jurisprudence from *Buckley* v. *Valeo*, 424 U.S. 1 (1976), to *McConnell* v. *FEC*, 540 U.S. 93 (2003), is a paradigm example of the proverbial slippery slope. What began as narrow exceptions to the First Amendment's jealous protection of political speech have now become the unchallenged starting points for attenuated analogies by the government used to support ever-expanding restrictions on core First Amendment activities. Where regulation based on the communicative impact of speech was once the greatest First Amendment sin, it is now precisely such impact – speech's ability to influence voters, and hence elections – that provides the government interest justifying regulation, as if influencing elections through *speech* was somehow corrupt.

In *Buckley*, this Court took the first steps down the slippery slope by upholding limits on the direct contribution of money to present and prospective officeholders. 424 U.S. at 25. Although such contributions were in no credible sense "bribes" and could, of course, only be used for speech and associated activities, this Court nonetheless viewed them as having the simplistic smell of bribes and the potential for actual or perceived corruption.[2] *Buckley* likewise denigrated the First Amendment value of candidate contributions as a form

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[2] Although calling such contributions "corrupt" was a stretch, there seems little point in revisiting the serious difficulties of that approach. *But see* Erik S. Jaffe, McConnell v. FEC: *Rationing Speech to Prevent "Undue" Influence*, 2003-2004 CATO SUPREME COURT REVIEW 245, 290-96 (2004) ("*Rationing Speech*") (critiquing the corruption rationale in *Buckley* and *McConnell*).

of expression and association by arguing that such contributions involved only symbolic and inarticulate expressions of support and ultimately produced only speech-by-proxy (the candidate) rather than speech by the contributor himself. *Id.* at 20-21.

Following that first, and imperfect, analogic leap from actual bribery to campaign contributions, this Court the took the next step down the slippery slope, analogizing coordinated private *expenditures* for speech to direct contributions to candidates. *Id.* at 46-47. Of course, that analogy again was far from perfect, insofar as even *coordinated* expenditures involved the direct speech of the private party, not merely speech-by-proxy, and limiting such expenditures undermined the effectiveness of such speech and free association. This Court in *Buckley* nonetheless seemed to think less of the value of such speech and saw similar dangers therefrom, perhaps due to its lack of independence and its potential for candidate control.

Buckley next looked at *uncoordinated* expenditures and concluded generally that such expenditures had a higher speech value and a lower danger of actual or perceived corruption and thus were worthy of greater protection. *Id.* at 44, 48. Despite that general recognition of protection, however, this Court proceeded to carve out a then-narrow exception allowing the regulation of independent expenditures for "express advocacy" of the election or defeat of a candidate, and thus took its most fateful step down the slippery slope. Understanding the reasons for, and the implications of, the express advocacy exception to First Amendment protection is critical to resolving the issues presented here.

In limiting the statutory restriction on expenditures "relative to a clearly identified candidate" to the narrow class of express advocacy of the magic-words variety, this Court ostensibly was responding to vagueness concerns raised by the broad statutory language. But in fact the statutory language was vague only insofar as it was overly *broad*, and many of

the concerns discussed by this Court involved such *overbreadth.* It was in that dual context that the Court discussed the inevitable blending of issue advocacy and the discussion of candidates as examples of speech that it thought could not be regulated consistent with the First Amendment. 424 U.S. at 42-45.

Seeming to recognize the questionable nature of its enterprise, this Court explained that a broader exception to First Amendment protection would be inappropriate because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Buckley*, 424 U.S. at 42. *Buckley* resolved the inevitable overlap by drawing narrow and clear parameters for the speech that could be regulated: speech that used specific words of express advocacy. *Id.* at 43-44 &n. 52. Those parameters also had the benefit of preventing regulation of speech that this Court viewed as plainly protected, such as speech concerning the candidates in general and concerning issues of public interest, regardless of any overlap such speech might have with speech concerning the election. By excising from protection only exhortations such as "vote for," "elect," or "support" (and their converses), the Court implicitly found the loss of such statements to have less of an impact on the marketplace of ideas than would the loss of the broader discussions it protected.[3] Within the nar-

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[3] Viewing the bare exhortations of express advocacy as lower in value than broader discussions of candidates and issues helps explain why the seemingly arbitrary magic-words requirement may have made more sense than had appeared. The magic words were excised not because speech lacking such words had no impact on an election, but rather because the use of those words alone simply appealed to non-rational bases for decision, for example simple name recognition or a conditioned response to imperative speech as a reason to vote for a candidate. Absent such magic words, speakers had to persuade voters to reach such conclusions on their own, which required engaging their reasoning in order to draw a connec-

row category of express advocacy, however, this Court then found the analogy to contributions and coordinated expenditures close enough to allow express advocacy to be regulated as a means of preventing *circumvention* of the contribution limits. 424 U.S. at 43-44 & n. 52.

By the end of *Buckley*, this Court had moved three iterations away from its starting point that bribery was corrupt and could be regulated and, through increasingly attenuated analogies, permitted the regulation of higher value speech with only a tenuous connection to the underlying corruption rationales it had used to regulate contributions. And it had added the uniquely hazardous additional justification of preventing "circumvention" of prior restrictions on supposedly lower value contributions as a justification for regulating higher-value independent expenditures.

By the time this Court decided *McConnell*, *Buckley*'s initial corruption rationale had again expanded and was to be "'understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence.'" *FEC* v. *Beaumont*, 539 U.S. 146, 156 (2003) (citation omitted). The expansion also included additional reasons for restricting corporate political speech, including the supposed "special advantages" of the corporate form "that enhance their ability to attract capital and * * * to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace," and the prevention of corporations being used "as conduits for circumvention of [valid] contribution limits" by

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tion between the issue being discussed or the qualities of the candidate and the conclusion that the voter should vote for or against such candidate. Contribution limits and magic words restrictions thus could be viewed as an attempt to move election debates onto a higher plane of reasoned decision-making rather than to abandon them to naked exhortations and name-recognition exercises, activities which, in the age of advertising, some might view with suspicion and treat as lower-value forms of speech.

corporate owners or employees. *Beaumont*, 539 U.S. at 155 (citations and quotation marks omitted).

In *McConnell*, this Court used that expanded palette of arguments to extend the express advocacy concept – already attenuated – to speech that contained no such advocacy but that was characterized as the "functional equivalent" of express advocacy and pejoratively called "sham" issue ads. 540 U.S. at 206. Once again, however, the analogy was far from perfect, *see* Dorie E. Apollonio & Margaret A. Carne, *Interest Groups and the Power of Magic Words*, 4 ELEC. L.J. 178 (2005), and served to expand the scope of regulated speech to include increasingly higher value speech with fewer dangers of corruption or its appearance.

The question now confronting this Court is whether the express-advocacy exception – created by *Buckley* and expanded by *McConnell* – will swallow the rule.[4] Before answering that question, this Court should step back and survey the destruction from its three-decade slide down the slippery slope – the continued restriction of increasingly important categories of political speech based on ever more attenuated justifications. Even if this Court is unprepared to correct the errors of its earlier decisions, the very least it should do is stop extending those errors, starting with the recognition of meaningful First Amendment limits on BCRA as applied to grass-roots lobbying ("GRL").

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[4] It speaks volumes that appellants would answer that question with a resounding "yes." Indeed, they quote the very passage *Buckley* used to *limit* its restrictions on speech as a justification for expanding such restrictions. FEC Br. at 30; McCain Br. at 34-35. Rather than seeing *Buckley*'s recognition that "candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and government actions," 424 U.S. at 42, as a reason it cannot suppress electoral advertisements, appellants proffer it as a reason why government should be free to *further* restrict the discussion of such important issues themselves.

II. GRASS-ROOTS LOBBYING IS CORE POLITICAL SPEECH, ASSEMBLY, AND PETITIONING ACTIVITY.

There can be no serious doubt that the GRL in this case lies at the very heart of the First Amendment. Discussion about and criticism of the government in general, our elected representatives in particular, and the various policies or actions being adopted and considered by them are both the essence of and the fundamental predicates for political participation by the People – the ultimate sovereign within our constitutional structure.

Few activities so perfectly combine the essential elements of concern to the First Amendment as does the exercise of the right to assemble and petition the government for a redress of grievances. It involves the discussion and exchange of ideas regarding government conduct among the people being assembled; it involves the communication of those ideas to the government and the individual members thereof whose job it is to represent us; and it involves the peaceful call for government action made by the very source of all authority in our constitutional system, the People. If the First Amendment has *any* remaining meaning as a binding restriction on Congress, surely it must mean that such activity cannot be restricted or burdened for anything less than the most compelling and immediate reasons, and even then to the least extent possible.

The specific activity under review in this case – grass-roots lobbying – is among the purest examples of such fundamental First Amendment activity. The advertisements in question directly address Senate filibusters of judicial nominees, a contentious public policy issue that was and will continue to be a major source of political conflict within Congress and throughout the country. The advertisements were directed to the ultimate source of legitimate government authority, the People themselves, and indirectly towards the relevant agents of the People, the Senators considering whether to filibuster. The advertisements likewise contained

a mixture of information (informing the people that filibusters had occurred and were threatened), argument (analogizing filibusters to various forms of obstruction, delay, and waste of resources), opinion (expressing the view that filibusters are bad), a call to action (asking people to contact their specific Senators and petition them to oppose the filibuster), and a means for many people to easily assemble to accomplish that action (a link to a website facilitating the petitioning of appropriate Senators).

In short, GRL in general – and the advertisements here in particular – represent virtually "perfect storms" of First Amendment activity, constituting speech, assembly, and petitioning, and facilitating further such activity by the public.

Finally, beyond the general and particular attributes of GRL described above, the evolution of other legal doctrines and developments has magnified the importance of GRL from a structural perspective, forcing it to shoulder more of the government-checking burdens that might instead have been borne elsewhere. In numerous cases seeking to invoke constitutional checks against legislative authority, this Court has adopted a highly deferential approach, advising us that if the public does not like the way the elected branches are exercising such authority they should take it up with their legislators, not with the courts.[5]

But that very advice to raise such issues with the legislature makes GRL all the more important because that is precisely what GRL does. GRL is now one of the few remaining

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[5] *See, e.g., Gonzalez* v. *Raich*, 545 U.S. 1, 33 (2005) (rejecting commerce clause challenge and suggesting resort to "the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress"); *Daniel* v. *Family Sec. Life Ins. Co.*, 336 U.S. 220, 224 (1949) (rejecting due process challenge and holding that the "forum for the correction of ill-considered legislation is a responsive legislature."); *Munn* v. *Illinois*, 94 U.S. 113, 134 (1877) (rejecting due process challenge and stating that "[f]or protection against abuses by legislatures the people must resort to the polls, not the courts.").

checks on a Congress that has accreted power far beyond that exercised in 1789 and that, in most cases, has little to fear from the deferential constitutional scrutiny applied by the courts. If such fundamental political activity is allowed to be constrained by the very Congress toward which it is directed, then the promise of political checks as adequate substitutes for constitutional checks rings especially hollow indeed. *Cf. United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). First Amendment protection for GRL thus represents the type of structural check without which other democratic processes cannot adequately function.

Insofar as the notion of government of the People, by the People, and for the People retains any value whatsoever in our constitutional system, there must be *some* firm First Amendment lines drawn and *some* ground upon which the government may not tread. Of the two fundamental expressions of the sovereignty of the People – advocacy regarding *who* to elect as our representatives and advocacy regarding *what actions* those representatives take while in office – the former is already heavily regulated and in no cogent sense "free." Such limitations on speech directly addressing *who* should be elected to office thus exponentially increase the value of remaining speech regarding *what* those elected officials should do while in office. GRL is precisely such fundamental speech, and should be protected vigorously.

III. BCRA'S BURDEN ON GRASS-ROOTS LOBBYING IS SEVERE AND FAR-REACHING.

On its face BCRA constitutes a content-based restriction expressly targeted to the communicative impact of GRL. Such restrictions are, by definition, substantial for First Amendment purposes wholly apart from their quantitative impact on the speech in question. *United States* v. *O'Brien*, 391 U.S. 367, 382 (1968) (discussing situation in which a

statute aimed at suppressing communication could not be sustained).[6]

A. BCRA Places Substantial Restrictions on Legitimate Grass-Roots Lobbying.

Even aside from the content-based nature of the restriction at issue here, BCRA uniquely targets large quatities of the most effective form of GRL.

First, the type of GRL restricted by BCRA in this case – broadcast communications in close proximity to an election that name specific Senators, one of whom was up for reelection, and that are targeted to those Senators' constituents – is the most meaningful, effective, and essential form of GRL one can imagine.

As was true in this case, Congress is often in session during the 30 days before a primary and the 60 days before a general election, and voting on issues that are important to the public. Issues under consideration before Congress do not go away as elections near, and the importance of GRL during that period continues unabated.

The timing of the communications during the run-up to elections is a critical factor enhancing their potential effectiveness. Representatives feel uniquely compelled to listen to the petitions of constituents precisely when those constituents are preparing to exercise their franchise. The public itself likewise is most focused on the actions of their representatives as elections approach and is then most inclined to be receptive to information, advocacy, and calls for action. The pre-election combination of official receptiveness and public

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[6] A content-based $1-per-year tax applied only to speakers who criticize elected officials would entail a substantial First Amendment burden notwithstanding that it would have essentially no impact on the number of critical speakers or the amount of critical speech, and even though it ostensibly would be viewpoint neutral.

focus thus makes the type of GRL at issue here uniquely vital to the democratic process

Furthermore, the 30/60-day restricted periods set forth in BCRA and assumed by this Court in *McConnell* vastly understate the actual amount of time GRL is restricted in election years. In a recent analysis of the 2004 election cycle, Former FEC Chairman Bradley Smith (a founder of *amicus* CCP) and his co-author demonstrated that BCRA had a far greater temporal impact than previously assumed. *See* Bradley A. Smith & Jason R. Owen, *Boundary Based Restrictions in Unbounded Broadcast Media Markets:* McConnell *v.* FEC*'s Underinclusive Overbreadth Analysis*, -- STAN. L. & POLICY REV. 101 (forthcoming 2007). That analysis found that because BCRA's restrictions are triggered not merely by primaries and general elections, but also by national conventions in presidential election years, they actually cover the additional 30-plus days before and during *each* such national convention. *Id.* at 108. Additionally, many broadcasters operate in multi-State media markets and reach 50,000 persons in more than one State. Where those States hold their primaries at different times, as they often do, the restricted periods under BCRA overlap and hence expand the total time during which GRL and other electioneering communications are restricted. In operation, the actual period of restriction is often more than 120 days in presidential election years, and can rise to over 200 days in the larger multi-State media markets. *Id.* at 126 (Table 1 summarizing the length of BCRA restrictions in 2004, including: 188 to 217 days in the Washington, D.C. media market across various stations covering 5 States and reaching 2.25 million persons; 196 to 198 days in the Chicago media market across various stations covering 4 States and reaching 3.43 million persons; 196 to 212 days in the Philadelphia media market across various stations covering 4 States and reaching 2.92 million persons; 184 days in the New York City media market across various stations covering 4 States and reaching 7.37 million persons). That greater

burden imposed by BCRA's actual operation renders faulty this Court's apparent assumption in *McConnell* that the length of the restriction was limited to a mere 90 days.[7]

Second, naming specific Senators and targeting the relevant electorate – otherwise known as the Senators' constituents – is an inherent and essential aspect of effective GRL. The very point of GRL is to influence congressional action on an issue of concern, and the only realistic means of doing so is to maximize the congruence between the would-be petitioners and the officials being petitioned. Petitions by non-constituents may not be wholly ignored, but those by the "relevant electorate," 2 U.S.C. § 434(f)(3)(2), cannot be ignored without political peril.

Specifically identifying the official to whom subsequent petitions should be addressed likewise is an integral part of any grass-roots lobbying effort. Generic criticism of government conduct without clear information and direction regarding what to do about it is but a pale shadow of effective assembly and petitioning. Providing information regarding how to contact the relevant decision-maker enhances the chances of subsequent petitioning activity by the target audience. The failure to identify the proper recipient of a proposed petition places the information-gathering burden on individuals, making it more difficult to assemble a large group to petition the

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[7] The differences between the assumed and the actual burden of BCRA likewise renders inapplicable *McConnell*'s facial analysis of the burden's and benefits of BCRA when considered in an as-applied challenge raised after such real-world data has become available. And, as the BCRA restrictions project further out from the general election, the likelihood that such restrictions will impact a greater percentage of genuine issue ads increases. At a minimum the new data gives this Court ample reason to limit its holding in *McConnell* to the abstract facial questions presented therein, and to give that ruling little weight (or to reconsider it entirely) when it comes to resolving challenges such as the one in this case.

government.[8] Naming names thus lies at the heart of effective GRL and likewise at the heart of the First Amendment.

Third, the GRL at issue here – promoted and organized through broadcast media – is also a singularly effective and vital form of such First Amendment activity. This Court itself once recognized that broadcast media are "indispensable instruments of effective political speech." *Buckley*, 424 U.S. at 19. Indeed, the very reason broadcast communications are more heavily restricted by BCRA is *precisely* because they are more effective at reaching the target audience and hence "influencing" elections. What is accepted by this Court and Congress regarding the greater effectiveness of broadcast communication to influence elections necessarily requires acknowledgment of the unique effectiveness of such communications as the means for GRL to inform, encourage, and enable the public to further petition their representatives.

B. Alternative Avenues of Communication are Inappropriate, Inadequate, and Short-Lived Justifications for Restricting Core Political Speech.

Appellants repeat the argument, raised in *McConnell* and elsewhere, that the First Amendment burden here is minimal because there are adequate alternative channels of communi-

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[8] *See* Michael Delli Carpini & Scott Keeter, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 69-71 (1996) (citing studies demonstrating that most Americans do not know where in government responsibility lies for setting and carrying out most government policies); Stephen E. Bennett & Linda Bennett, *Out of Sight Out of Mind: Americans Limited Knowledge of Party Control of the House of Representatives 1960-84*, 35 POL. RES. Q. 67 (1992) (most Americans do not know which party controls Congress, and hence need names in order to act to properly communicate preferences); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1309 (2004) (citing data showing that during the campaign most voters in elections cannot name a single candidate).

cation for engaging in GRL. FEC Br. at 35-36; McCain Br. at 29-31. That argument is flawed for a variety of reasons.

First, even asking the question whether adequate alternative channels of communication exist for core political speech is inappropriate in the context of strict scrutiny of the content-based regulation of GRL in this case. Where a regulation is content-based, the First Amendment burden is severe by definition and is not diminished by the potential for speakers to communicate in a different manner preferred by the government. In fact, consideration of alternative channels of communication only makes sense in the context of neutral time-place-manner restrictions and conduct regulation that only incidentally burden speech because many government actions can *affect* speech without in any real sense abridging the freedom of speech, and strict scrutiny in all such cases would grind government to a halt.[9]

In this case, however, BCRA's restrictions on electioneering communications are imposed precisely based on the content of the speech and for the very purpose of suppressing their communicative impact, *i.e.*, their potential for persuading voters and thereby potentially influencing elections.[10] To import the reasoning of adequate alternative channels of

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[9] The obvious examples are ordinary income or sales taxes, noise ordinances, and parade permits, each of which can reduce total speech but is not targeted to the content or communicative impact of such speech.

[10] *See Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994) ("Government action that stifles speech on account of its message * * * pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."); *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 790-91 (1988) ("'The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.' * * * To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.") (citation omitted).

communication into this context is thus a troubling and dangerous extension of a narrow line of cases and contributes to the downhill slide in First Amendment protections for core political speech.

Second, what the government today relies upon as mitigating alternative channels of communication will inevitably be derided tomorrow as means of circumventing the latest restrictions. Indeed, insofar as any of the alternative channels are in fact "adequate" to inform members of the public about the activities of their elected representatives and persuade them to take action directed at such officials, such alternatives will likewise carry the same risk of influencing an election under the exact same reasoning the government employs here.[11]

If this Court accepts the "influence elections" and circumvention arguments made by the government in this case, there will be no coherent stopping point for rejecting those arguments when the next channel of communication is shut down. Any arbitrary lines drawn now drawn by BCRA between regulated and unregulated channels of expression will seem just as arbitrary in the face of the government's future arguments as the "magic-words" test seemed in *McConnell*. In fact, once the current restrictions shut down the type of GRL at issue in this case, alternate forms of communication will necessarily assume a greater prominence (even if they are less effective), and hence today's restrictions will affirmatively create tomorrow's supposed dangers from other forms of speech. Each time one avenue for political speech is closed, those remaining will become more important, and thus more likely to create "corruption" or its appearance, thus justifying their regulation.

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[11] Indeed, various States, taking their cue from *McConnell* and BCRA have already adopted restrictions on electioneering communications that are not limited to speech through broadcast media and cover many of the supposed alternative channels of communication.

Indeed, that is precisely what happened in the shift from express advocacy to so-called issue ads, and it is even happening again today in connection with 527 organizations, which were once touted as a safety valve for independent speech but are now being attacked as a loophole allowing circumvention of BCRA. In short, the government and this Court simply cannot have it both ways, simultaneously touting the First Amendment benefits of other avenues of communication and then treating them as mere loopholes that cannot be allowed to circumvent the latest round of restrictions.

Third, none of the supposed alternative channels are in fact adequate replacements for the GRL in this case.

Avoidance. The option of simply avoiding BCRA's timing, broadcast, or candidate-identification triggers is not an *adequate* alternative given that those triggers are the very same elements of the most effective GRL. *See* Part III.A, *supra* at 14-17. Indeed, the very point of BCRA limiting its regulation to broadcast media during the run-up to elections was *precisely* because those ads were the most effective form of communicating with the public in a meaningful manner and that the other forms of communication left open were supposedly less dangerous because of their diminished communicative effectiveness. And, as applied to GRL in particular, closing off the most effective channels of communication will have a cascade effect reducing not just the regulated speech itself but also any resulting petitioning activity as well.

PAC Funding. The so-called PAC option likewise is not an adequate alternative. Any previous notion that establishing and maintaining a PAC is a minor administrative task has become increasingly incredible with each new round of legal obligations and restrictions on PACs and those who run them. Just the legal fees, record-keeping, and reporting requirements alone can be daunting, making it costly or impossible for ordinary citizen groups to engage in robust and effective GRL. The PAC option thus reserves the most effective ave-

nues of communication for large and well-funded entities who have ready access to existing institutional resources and expertise.

The various funding source, amount, and disclosure requirements for PACs likewise make it especially difficult for new or smaller groups, with severely restricted numbers of persons from whom they can solicit funds, to raise the quantities of PAC money needed for broadcast communications. Indeed, the very facts of this case demonstrate that the PAC resources available to groups like WRTL can be wholly inadequate to enable them to use broadcast media for their message. WRTL Br. at 9-10 & n. 17[12]

Furthermore, because the funding-source limits on the PAC option disproportionately hurt smaller organizations, BCRA tilts the GRL playing field in favor of larger and better-organized entities and commercial entities with greater resources. As a practical matter, the burden of the PAC option will fall on precisely those "grass-roots" groups that rise up in timely response to current issues, but will have less of an impact on the large institutional "special" interests that were of supposed concern to Congress. Constraining effective GRL also will shift power and influence regarding legislative issues to incumbents, who have far better alternatives to get out their message in the context of pushing legislative agendas and garnering free media attention. That shift gets things precisely backward, with incumbent representatives able to lobby the public through the mass media, but the public unable to organize and lobby the incumbents through the same means.

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[12] Using the PAC option for GRL also would compete with other uses for PAC money. Limited PAC resources are already the only means for nonprofit and other corporations to make contributions or to engage in express advocacy. Expanding the scope of First Amendment activity forced through the PAC option thus decreases the amounts available for each type of protected activity and places a fixed limit on the covered expressive activity by those organizations.

IV. THE GOVERNMENT INTEREST IN SUPPRESSING GRASS-ROOTS LOBBYING IS ATTENUATED AND NOT COMPELLING.

The purported government interest at issue in this case is the asserted but unproven *hypothesis* that GRL organized and advocated by a corporation using general treasury funds has the potential to "corrupt" or exert "undue influence" upon political office holders who might be thankful for such efforts or to cause the appearance of such corruption or undue influence. That hypothesis is flawed both in its conception of "corruption" generally and in its application to GRL in particular.

A. Corruption and Its Appearance Are Distant Concerns and "Circumvention" Is a Never-Ending Excuse for More Regulation.

As described in Part I, the government's original interest in fighting corruption and the appearance of corruption has become more and more attenuated with each effort at further regulation. While the corruption interest was never well-reasoned, even in connection with direct contributions to candidates,[13] the interest is now really one of avoiding supposedly "undue" influence and preventing circumvention of the last round of regulations, which in turn were justified as preventing circumvention of earlier restrictions, which eventually were tied to the underlying purpose of avoiding corruption or its appearance. That circumvention rationale, however, becomes more faulty with each iteration.

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[13] *See* Stephen Ansolabehere & James M. Snyder, Jr., *Why Is there so Little Money in U.S. Politics*, 17 J. ECON. PERSPECTIVES 105 (2003) (examining 36 published, peer reviewed studies on effects of money in U.S. politics since 1981, and concluding, "the evidence that campaign contributions lead to substantial influence on votes is rather thin * * *. Money has little leverage because it is only a small part of the political calculation that a re-election oriented legislator makes.").

To begin with, no one seriously suggests that the GRL in this case involves the actuality or appearance of anything resembling true "corruption" as conceived in *Buckley*. Rather, the interest now is in preventing the actuality or appearance of that dim shadow of corruption – "undue influence" – and the prophylactic prevention of "circumvention" of previous restrictions on speech. The notion of undue influence, however, is an ill-defined snake pit, without any coherent baseline of what amount or type of influence is "undue" and what influence is simply part of the ordinary democratic process. *See Rationing Speech*, 2003-2004 CATO SUPREME COURT REVIEW, at 295-96. Such a vague and attenuated interest hardly qualifies as compelling even by its own uncertain terms.

Worse still, an asserted interest in prophylaxis against circumvention is at best a diversion and at worst a self-fulfilling justification for never-ending rounds of further regulation. If abstracted from the original supposed evils of corruption via bribery or even supposedly via large contributions to candidates, the mantra of circumvention tends to hide how much disfavored conduct is actually leaking through the earlier legislative barriers and hence obscures the magnitude (or lack thereof) of the underlying interest. Surely the government could not claim – and this Court could not accept – that contribution limits themselves have *no effect* on corruption or its appearance or that circumvention of those limits is 100% effective at generating the same amount and perception of corruption.[14] Likewise with the restrictions on coordinated expenditures and on express advocacy. If we are to accept the validity of such restrictions in the first place, we must assume that they are effective in preventing some meaningful portion

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[14] If such were in fact the case, the initial limits would presumably be unconstitutional for failing to directly advance the interests asserted.

of the evil at which they were directed.[15] With each new layer of regulation, therefore, the remaining harm to be avoided necessarily diminishes and the importance of the new speech being regulated necessarily increases. Those two curves must cross at some point and, short of overruling past cases (which would make the *most* sense and be most faithful to the First Amendment), GRL seems to be a sensible place for the balance to shift. Multiple layers of prophylaxis simply address more and more attenuated risks of the underlying danger and at some point such risks must cease to present compelling interests.[16]

In addition to diverting attention from the diminishing government interest, an anti-circumvention interest inevitably feeds upon itself, with each new restriction spawning supposed circumvention and the need for further restrictions. *See* Part III.B, *supra* at 19. Indeed, if preventing circumvention is accepted as an independent compelling interest, then all alternative channels of communication could readily be re-characterized by the government as circumvention of previ-

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[15] Even assuming each layer of regulation was only 50% effective in preventing corrupting conduct, three layers of prophylaxis would presumably eliminate 87.5% of the objectionable behavior. The proper question after that is not whether avoiding circumvention *per se* is a compelling interest, but rather whether the marginal gains in prophylaxis (for example another 6.25% for a fourth layer of prophylaxis in the example above) is sufficiently compelling to justify substantially expanding restrictions on larger and larger quantities of ever higher-value speech.

[16] Surely this Court must weigh the *magnitude* of a risk, not merely its abstract character, to decide whether it is a compelling justification for a particular restriction or application. *Cf. Van Orden* v. *Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in the judgment) (Establishment Clause analysis a matter of "degree" in close cases; finding that a mixed message including some religious component did not establish religion). Because mixed messages in political debate may be inevitable to some extent, the only way to eliminate *all* risks associated with election-related speech is to eliminate all freedom of speech, a solution that is anathema to our constitutional system. *Cf.* Federalist No. 10, THE FEDERALIST PAPERS 45-46.

ous limitations that simply did not reach far enough. Nothing would be immune from such a justification, which would not disappear until all speech with any possible impact on elections were restricted or perfectly equalized in a perverse echo of the one-person-one-vote principle.

In the end, it is more than passing strange to characterize efforts to maximize First Amendment activity up to, but not crossing, the boundaries of existing restrictions as "circumvention" of those restrictions unless one wrongly assumes that virtually *any* effort to influence who gets elected and what actions they take is unacceptable. Effective political speech and association used to influence government are not means of *circumventing* restrictions on supposedly improper influence. Rather, they are the constitutionally favored alternatives for achieving desired ends *without* force, bribery, or other improper means.

B. There Is No Risk of Actual Corruption or Even "Undue" Influence.

The particular ads in this case present no risk of corruption or undue influence, and amply demonstrate how far the government has strayed from any legitimate interests it might have.

First, the messages in this case do not discuss the positions of the named officials regarding judicial filibusters, but rather simply ask the public to petition the Senators to oppose the filibuster. There is no indication of candidate support or opposition in the ads. Any implicit support of or opposition to a candidate from such communications will depend largely on the candidate's response to the ensuing petitions and the public's independent investigation of such issues.

Indeed, insofar as any support or opposition to a candidate can only be inferred by the audience from the overall context of the election or other external sources in combination with the GRL at issue, that simply demonstrates the unique First Amendment value of GRL and distinguishes it from other

forms of speech that this Court has allowed the government to regulate. As noted in Part I, *supra* at 6-9, *Buckley*'s denial of protection to contributions, coordinated expenditures, and express advocacy seemed to derive in part from the express or implicit assumption that such expression were somehow less worthy under the First Amendment, being either symbolic and undifferentiated in message, lacking independent control or contribution to the marketplace of ideas, or constituting merely conclusory exhortations to action. But where speech consisted of independent discussion of issues, even where such discussion inevitably would touch upon *candidates*, this Court protected such speech notwithstanding its potential to influence elections.

The lesson of such treatment thus illustrates the overarching principle that what such regulable forms of speech have in common, and what differentiates them from protected speech, was a perceived lesser contribution to the marketplace of ideas, the speech being either inchoate, in control of a proxy, or a bare exhortation lacking analysis. When asking whether other speech is thus the "functional equivalent" of express advocacy, it is those qualities that must be the touchtone, not the potential to influence elections that was equally present in the speech *Buckley* protected.

Applying the above principle, the GRL in this case is not even remotely the "functional equivalent" of the express advocacy in *Buckley*. Any conceivable election impact from the GRL here would be entirely the result of educating the audience on *issues* and then the audience using such issues to evaluate candidates – the seemingly ideal form of democratic persuasion and decision making. Insofar as the express advocacy in *Buckley* was unprotected because the particular words "vote for" may have been deemed of limited First Amendment value – perhaps suspected of influencing the public through bare name recognition or Pavlovian response ("We Like Ike," repeat 100 times) – that is certainly not the case here.

At *worst* the GRL ads in this case represent the direct discussion of issues that are unavoidably intertwined with the discussion of candidates because they are issues that the candidate is continuing to address in his ongoing legislative duties. The speech here not only encourages voter awareness, but in fact cannot have any impact on the election without the further step of active voter attention to and participation in the marketplace of ideas in order to draw any connection between the ads themselves and the various extrinsic circumstances and information upon which appellants rely to claim a purpose and effect of influencing elections.[17]

Ultimately, if discussion of a candidate's current legislative activities has some indirect influence on that candidate's election, such effect is entirely proper, squarely within the core concerns of the First Amendment, and hardly undue, corrupting, a sham, or any other pejorative the government might choose.

Second, the timing of broadcasts in the run-up to the election does not raise the inference that the GRL ads are "shams." Importantly, the timing coincided with the timing of the Senate filibusters from which the relevant legislators were being asked to abstain. The issues subject to GRL do not simply stop as an election approaches, and neither should the right to engage in effective lobbying. And, as described in Part III.A, supra at 14-17, proximity to an election is when GRL can be most effective. Timing advertisements for such period thus is less indicative of a sham than of a desire to

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[17] Even assuming some implied electioneering content to GRL, whether the ads in this case or even future ads that negatively identify a candidate's legislative position, at best such GRL would involve a *mixed message*, not a sham. Such mixed messages are precisely what *Buckley* referred to, and sought to protect, when limiting restrictions to express advocacy in the form of bare exhortation rather than argument and, as a practical matter, do not pose the same risks of *undue* influence. Any influence exerted is due entirely, and properly, to the desirable functioning of the marketplace of ideas.

capitalize on election interest to further the *issue* advocacy itself. The analogy to direct advocacy and even to "sham" issue ads such as those attacking a politician personally and then mentioning some policy issue in passing is thus considerably weaker and the government interest in regulating such speech is even more attenuated.

Third, the notion that GRL might pose a particular danger when coming from a corporation is, at a minimum, more attenuated for a non-profit corporation, and is truly a stretch in the context of speech the ultimate influence of which is determined by the demonstrable support it receives from the public in the form of resulting petitions to elected officials. Insofar as the perceived unfairness of corporate wealth being used for expenditures is premised on the notion that corporations can generate speech and influence out of proportion to the strength or support behind their ideas and hence beyond the amount of speech and influence they *ought* to have, that begs the question of what is the "proper" amount of speech and influence.[18]

Furthermore, in the context of GRL, the danger of *undue* influence is limited at best because any supposed influence from such ads will presumably be a function of how many people actually follow the advice of such ads and petition their representatives. Even accepting that such resulting activity might have an influence on an election, it is hardly *undue* in that it is directly tied to the amount of public support generated by the speech in the readily identifiable form of a

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[18] Though failing in its application, *Buckley* at least correctly recognized that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." 424 U.S. at 48. That, said *Buckley*, is "wholly foreign to the First Amendment," the protections of which "cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 48-49. Manipulating different groups' relative ability to speak "is a decidedly fatal objective." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 579 (1995).

petition. We thus have a direct measure of the effectiveness of the GRL and hence the actual and perceived influence of the organizer will be in direct proportion to the number of people who act on the advice given, not simply on the dollar amount spent on the ad. If nobody responds to the ad it will presumably have no influence on the candidate or the election; if many people respond to the ad, then the magnitude of the potential influence will be a function of such voter support and hence not undue.[19]

C. Avoiding the Mere Appearance of Corruption Is Not a Compelling Interest and Is Not Advanced by Restricting Grass-Roots Lobbying.

In the absence of actual corruption, avoiding its mere appearance should not be sufficient to suppress protected speech. The proper First Amendment remedy for such false appearances is more speech, not less, the election of candidates voluntarily practicing the public's notion of virtue, or, ultimately, a constitutional amendment if the existing system cannot hold the public's confidence. The government surely could not forbid speech accusing elected officials of corruption because they kow-tow to political polls or favor the interests of their home states, regardless whether such criticism caused the public to *believe* – rightly or wrongly – that elected officials were corrupt.

Furthermore, there is simply no basis for concluding that the type of GRL at issue here has any impact whatsoever on the public's perception of corruption, and hence trying to alter

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[19] The disparagement of corporate speakers as "special interests" adds nothing to the analysis beyond the unsupported assumption that such speakers have interests that are materially *narrower* than those of other speakers. And even were such an assumption true regarding corporate speakers, such narrow interests are actually a benefit in the context of Madison's remedy for factions, ensuring the diversity of groups with separate agendas that makes it difficult to form a stable majority faction.

that perception is not a reason to restrict *this* speech.[20] Indeed, if there is a perception of government corruption, it is just as likely to come from the demonization and over-regulation of political speech leading the public to see corruption where none actually exists. Further regulation would just worsen that perception, not improve it.

Finally, fostering public confidence in government for its own sake is by no means a virtue. Such confidence may be desirable for a government actually *deserving* of such esteem, but our history as a nation tends to favor the virtues of a skeptical, even critical, public as a means of keeping the government honest and limited.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

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[20] Indeed, the public perception of corruption has little to do with speech at all, and turns on numerous other factors beyond the government's control. *See* Nathaniel Persily and Kelli Lammi, *Campaign Finance After McCain-Feingold: Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 152 (2004) (concluding on the basis of extensive empirical research that, "Americans' 'confidence in the system of representative government' – specifically, their beliefs that government officials are not 'crooked' and that government is 'run for the benefit of all' – is, to a large extent, related to their position in society, their general tendency to trust others, their philosophy as to what government should do, and their ideological or philosophical disagreement with the policies of those in charge.").

Respectfully Submitted,

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